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No. 81-1891

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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MORRISON-KNUDSEN CONSTRUCTION COMPANY

and

ARGONAUT INSURANCE COMPANY,

*Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## BRIEF OF RESPONDENT HILYER

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## QUESTION PRESENTED

Whether employer payments to three union trust funds for health and welfare, pension, and training purposes, the amount of which is measured by the employee's working time, and which are reserved for his ultimate benefit, are to be computed as being a part of his "wages" under the Longshoremen's and Harbor Workers' Compensation Act.

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## BRIEF FOR RESPONDENT HILYER

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### STATEMENT

The carrier/employer petitioners, joined at this point by the Director of the Office of Workers' Compensation Programs of the United States Department of Labor, argue that the challenged decision conflicts with the statutory definition, the intent of Congress, and prior decisions. Collectively they predict virtual chaos resulting to both private and public administration if the rule is permitted to remain.

In no sense are these points valid or even controversial. The contrary appears to be so obvious that it is only by discussing undecided matters that petitioners have any arguments for this writ. Additionally their projection of future administrative confusion appears to have been vastly exaggerated to further serve this purpose.

In this response we seek to show that the actual decision of the Court of Appeals was properly restricted to adjudging the three *negotiated* benefits in question. With that limitation the arguments of petitioners are seen to be based on their expansion of the term "fringe benefits" beyond the matters decided and, as such, lack any basis for review by this Court.

## REVIEW OF THE ISSUE

Although the disputed decision has been printed in its entirety (Pet. App. 5a-16a), the only question at issue is to be found in the lower court's ruling in Part I. That holding is based on a precise statement of the facts at issue (pp. 5a-7a), essentially that at the time Hilyer was killed in April 1974, he was shown to have been a dues-paying member of the Laborers' District Council of Washington, D.C. and Vicinity (the "Union"), and that the Union had negotiated an employment contract with Morrison-Knudsen and other employers which included a requirement that the three described employer payments should be made directly into the Union's Taft-Hartley trust funds for medical, pension, and training use. Each such payment was to be measured by one hour of Hilyer's working time. Had he lived, his equity in these three Taft-Hartley funds would have been repaid with medical insurance, pension installments, and training rights, both for himself and his family — the first two of which his widow must now purchase privately, and the third is a necessary item to renew her skills for her own reentry into the job market.

Were these three items a part of Hilyer's compensation "wages"? That was the single issue before the Court of Appeals. Three *negotiated* payments by the employer were made under the force of statute, a total of 68¢ for each hour of Hilyer's working time. Petitioners' argument that "fringe benefits extend into the area of petty privilege is to argue a case which the Court of Appeals never decided.

Neither the original petitioners or the formerly respondent Director describe the issue properly. Both avoid making any reference to the two most critical elements, first, that the payments were made to conform to a negotiated contract and, second, they were paid by the hour for Hilyer's services. The true issue on this petition therefore is quite different from that urged by petitioners. In the phrasing of this respondent it has been set out on the first page of this brief. It is that question to which the answer is clearly "yes" as the Court of Appeals held. To show the correctness of that decision we look first at the statute itself,* second to the intent of Congress, and third we review the prior judicial determinations bearing on this subject.

## I.

## THE ACT DEFINES NEGOTIATED BENEFITS TO BE A PART OF "WAGES"

As of the date of Hilyer's death, the District of Columbia had adopted the Act by reference (36 D.C. Code §§ 501, 502 (1973)), including its definition of "wages" (33 U.S.C. § 902(13), hereinafter § 2(13)):

> "'Wages' means the money rate at which the service rendered is recompensed under the con-

*Longshoremen's and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. § 901 *et seq.*

> tract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from other than the employer."

This definition is in two distinct parts. The first portion is based on the necessary existence of a *contract* of hiring under which the employer has used a "money rate" to pay for the services rendered by the compensation claimant. As to the second portion, petitioners argue that the phrase "similar advantage" is ambiguous. Mrs. Hilyer's claim is compensable under either portion of the statutory definition.

The brief of the original petitioners and of the respondent/petitioner, the Director of the Office of Workers' Compensation Programs (the "Director"), have both avoided the first portion of this definition:

> "... the *money rate* at which the service rendered is recompensed *under the contract of hiring in force at the time of the injury* ... (*supra,* emphasis added),

which precisely describes the contract conditions under which Morrison-Knudsen paid 28¢/hr. for each laborer's health and welfare, 35¢/hr. for his pension, and 5¢/hr. for his training — each according to a "money rate" specified in the agreement. Moreover, the definition states that "wages" as defined constitute the amounts the employer is obligated to pay for the "services rendered", not what the employee receives. This definition thereby avoids any difficulties of fixing a value for non-bargaining privileges.

On the facts of this case the Court of Appeals ruled that these payments into three Union trust funds were in legal effect the same as the take-home pay which Hilyer

received weekly, *Arroyo v. United States*, 359 U.S. 419, 425-6 (1959); *United Mine Workers Health and Retirement Funds v. Gracie Robinson, et al.*, ____ U.S. ____, 50 LW 4288 (No. 81-61), Mar. 8, 1982.

Each payment by Morrison-Knudsen increased Hilyer's equity in these funds. For that reason the payments were a negotiated part of the "recompense" which that petitioner paid him for his services, direct pay plus an equity in each of the three funds. Accordingly, the payments were directly within the first portion of the statutory definition.

Turning to the second portion of the definition and assuming *arguendo* that the point made above is inadequate, an inquiry as to the phrase "similar advantage" becomes necessary.

As the Benefits Review Board (the "Board") and the Court of Appeals saw the meaning of this portion of the definition, both were agreed that it meant that non-pay benefits which could be reasonably evaluated in money terms must be included in the"wage" base,

> "We agree with the Board that this definition 'clearly implies that values received by an employee that are readily identifiable and calculable should be included in the determination of the average weekly wage.' " (C.A.Op., Pet. App. p. 8a)

Are these three benefits "calculable"? The Board said "no", all three were "speculative". The Court of Appeals disagreed with that conclusion and held that they were not only identifiable but, using everyday insurance formulae, were calculable as well, adding that such an effort was not essential to any valuation under the Act since the employer payments were themselves a measure of Hilyer's equities at the time of his death (Pet. App. p. 12a).

In support of this conclusion, the fact that a death claim under Section 10 of the Act is here involved is not without significance. It is clear that Hilyer as an individual had lost any further possibility of participating in the ultimate distribution of these moneys and his rights had become fixed. If they could not be calculated under those circumstances, what possible equity measurement could have been made for an employee who was merely injured and intended to return to work? It stands to reason that the Act cannot be wholly frustrated by rejecting all such claims as "speculative".

In summation, the Court below was plainly correct under the definition in the Act, whether the first or second portion were to be used. The "values" in question were not only spelled out in the agreement between the employer and the Union, but the payments made by Morrison-Knudsen to the trust funds were a substantial part of Hilyer's "recompense", were fixed in precise money terms, and the 68¢/hr. total should have been included in his widow's compensation base.

## II.

## THE DECISION BELOW CONFORMS TO THE INTENT OF CONGRESS

Where the terms of a constitutional statute are plain, it is not the responsibility of the courts to further consider the reason for its enactment, *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); *Ex parte Collett*, 337 U.S. 55 (1949); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980). It is not a judicial function to question the wisdom of Congress, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978). Where the words are ambiguous, the search for the Congressional purpose must avoid reaching a conclusion which would lead to "incongruous results", *Voris v. Eikel*, 346 U.S. 328 (1953); *Baltimore &*

*Phila. Steamboat Co. v. Norton,* 284 U.S. 408, 412-413 (1932).

As indicated above, the words of Section 2(13) of the Act appear to be plain and the challenged decision properly carries out the purpose of the legislation. Any other holding would have brought the Act into conflict with each of the other related enactments made by the Congress and would thereby break the legislative pattern and create the very incongruity rejected in *Voris.*

We look to the 1972 revision of the Act and the absence of any change to the "wages" definition. As pointed out in *N.E. Marine Terminal Co. v. Caputo,* 432 U.S. 249, 261 (1977), an increase in the level of benefits was one of the three principal reasons given for the revision. See also *P.C. Pfeiffer v. Ford,* 444 U.S. 69 (1979). There was no reason why Section 2(13) should have been revised for this purpose. As it read, it covered the changes in labor practice which all parties note, the gradual but now widespread resort in labor negotiations to the provisions for specified payments into union trust funds in lieu of further advances in individual pay. In fact, it was the Congressional action in not revising Section 2(13) which is the strongest evidence that such payments by the employer were already considered to be included in the existing definition of wages. Had the Congress wished to narrow this, it would have said so.

To the same effect although of minor judicial import, we quote the opinion of an expert in this field, the language of Judge Miller dissenting in *Freer v. Duncanson-Harrelson Co.,* 9 BRBS 888 (1979):

> "It is my opinion that Congress intended the definition of wages to be flexible by including in that definition the term 'similar advantage received from the employer.'"

This was the view taken by the Court of Appeals (Pet. App. p. 8a) and fully justifies the non-revision of Section 2(13) at a time when Congress had become fully aware of the more modern labor practice of providing for these benefit funds. They relieved the employer of pension and off-premises medical costs.

The Congressional pattern may be found by considering parallel statutes, *Andrus v. Allard*, 444 U.S. 51 (1979). In effect, petitioners agree:

> "Moreover, one could argue — as unions and claimants undoubtedly will — that if the decision below makes sense as to the LHWCA, it makes equally good sense as to other statutes such as the Federal Employees Compensation Act, and those acts governing temporary disability insurance, unemployment compensation, Social Security, and state workers' compensation programs, which include language essentially the same as LHWCA." (Pet. Bf. p. 8)

The Court below took note of the fact that inclusion of trust fund payments had eight years earlier been written into the Davis-Bacon Act (40 U.S.C. 276(b); S. 963, 88th Cong. 2d Sess. (1964)) and that the same legislative purpose underlaid the adoption of the Labor Management Relations Act (29 U.S.C. 141 *et seq.;* 61 Stat. 136). Why then would the Congress have made these funds in the hands of the unions a trust for the members, *United Mine Workers Health and Retirement Funds v. Gracie Robinson, et al., supra; Inland Steel Co., et al. v. N.L.R.B.*, 170 F.2d 247, 251 (7 Cir. 1949); *N.L.R.B. v. Niles-Bement Pond Co.*, 199 F.2d 713 (2 Cir. 1952); *Arroyo v. United States, supra,* if they had not visualized such employer payments as being a form of compensation for the services rendered by those members? Had the funds been intended for the ultimate benefit of the union officials, no such provision would have been enacted.

The language of *Inland Steel* is very much in point:

> "Assume, however, that such supposed payments were made to employees as a result of a company obligation contained in a plan or program. Such an obligation would represent a part of the consideration for services performed, and payments made in discharge of such obligation would, in our view, be 'wages' or included in 'conditions of employment'." (At p. 253).

In the *Niles-Bement Pond* case it was held that the National Labor Relations Board is to decide which benefits are to be negotiated. True, that case involved a bonus payment. But the regularity of its payment made it a bargainable item. This distinction between the includability of happenstance benefits as against those of an entitlement character is shown by two decisions under the Selective Service and Training Act of 1940 (50 U.S.C. Appx. § 459(c)(1)). In *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966), severance pay by the employer was so fixed a right of the employees that it had to be included in a veteran's claim. On the other hand, in *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977), it was ruled that pension payments by the employer were not like wages for purposes of fixing veterans' seniority rights, but were rewards for actual continuous employment which was not the case of a returning veteran. Had they been due with "reasonable certainty" they would have been included.

The inclusion of such benefits in wages has also been the rule under the parallel Federal Employment Compensation Act ("any other benefit paid for out of the compensation fund"; 5 U.S.C. 790). This principle was adopted forty years ago in *United States v. Crystal,* 39 F.Supp. 220, 221 (N.D. Ohio, 1941):

> "There is no doubt that compensation, as defined in the Act, was intended to cover everything that the government had paid out, not only what the employee had received."

The Court below noted (Pet. App. p. 11a) your decision in *United States ex rel Sherman v. Carter*, 353 U.S. 210 (1957), holding such fund payments to be an integral part of the sums "justly due" to the union for its members under the Miller Act (40 U.S.C. § 270(2a)):

> "The parties have stipulated that contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. The unpaid contributions were a part of the compensation for the work to be done by Carter's employees."

Employer payments into union trust funds must be accounted for by a claimant under the Social Security Act (42 U.S.C. § 1107; 49 Stat. 642). The Seventh Circuit in the *Inland Steel* decision referred to § 907 of that Act (p. 254) as showing the intent of Congress to include in the employee's total compensation "all remuneration . . . including the cash value . . . paid in any other medium than cash."

Lastly, a direct entry into the thinking of our Congress is to be found in the requirement that fund pension payments be calculated as part of the income of the employee under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.; Alessi v. Raybestos Manhattan, Inc.*, ____U.S.____, 101 S.C. 1895 (1982). In short, every statutory provision dealing with the rights of *labor* reinforces the reading of Congress' intent to include employer trust fund payments in the earnings of the individual laborer.

*United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959) and *Potomac Electric Power Co. v. Director,*

*OWCP, supra,* are not to the contrary. The first was concerned with specified priorities under the bankruptcy laws for benefits *not* measured by hours, and the latter followed the plain language of the Act itself, applying the outdated compensation schedules provided by Congress, refusing to vary the legislative command regardless of the hardship involved.

Neither case therefore derogates from the stated conclusion above. The Court of Appeals found the legislative intent to be to include the challenged payments in an individual's wages and was fully justified by the comparisons it made.

## III.

## THERE ARE NO FEDERAL CASES WHICH DISAGREE WITH THE RULING BELOW

The Court of Appeals called this the first case to raise the question of the inclusion of Taft-Hartley fund payments in compensation "wages". Since such funds have been in increasing existence for at least some time before the passage of the Davis-Bacon Act in 1964 or the Labor Management Relations Act in 1974, petitioners' claim that compensation for them has never been paid before may not be wholly true. For example, in *Petition of U.S. Steel Corp.*, 436 F.2d 1256, 1274 (6 Cir. 1970), involving the death of a seaman, the Court of Appeals said:

> "Shipowners do not dispute the propriety of an award for fringe benefits."

The case held that future fringe benefits — similar in many respects to the present situation — constituted an essential part of the employee's "earning capacity", and this was the measure of compensation "wages". Whether others were so paid without making an issue of it, we do not know. But it does seem reasonable to con-

clude that *Hilyer* is the first case in which the question had been taken to issue in the federal courts.

To revert for a moment to the Seventh Circuit speaking in *Inland Steel*, the Court there noted the implication in the broad Congressional use of the word "wages":

> "Certainly the term 'wages' was intended to include something more than rates of pay."
>
> (p. 255)

In the statute there under consideration, "wages" had been defined as "all remuneration" (Social Security Act, *supra*), and the fund payments were regarded as coming within this definition.

Again, in *Curry v. United States* 338 F.Supp. 1219, 1223 (N.D.Cal. 1977), a District Court, in analysing the Public Vessels Act (46 U.S.C. § 781 *et seq.*), said,

> "Earning capacity includes the probability of fringe benefits."

Two cases discussed by the Court of Appeals (Pet. App. pp. 11a-13a) and now by the Director (Dir. Bf. pp. 7-8) are *Carter* and *Embassy*. In *Carter* it is held that an employer's payments into Union trust funds on the basis of hours worked were sums justly due to the employees and had to be paid by a federal contractor's surety. The ruling below so read *Carter*, and as showing, first, that the hourly measurement of such payments made them a part of the employee's "wages" (Pet. App. p. 12a) and, second, that in lieu of any complex actuarial computation, a simpler method was to value the employee's equity in the funds at the same amount as his employer had paid in for him (Pet. App. p. 12a).

*Embassy*, two years later, did not diminish this holding for the reasons given in the Circuit ruling (Pet. App. p. 13a). In *Embassy* you had before you the Bankruptcy Act with its own special plan for the distribution of assets to

creditors. That statute was enacted for a purpose almost diametrically opposed to the purpose shown by the Congress in revising the Compensation Act in 1972. The language of the Bankruptcy Act was clear and the priorities set were specific. Only the actual pay scale of the worker was to be included in the first category. That did not change the fact that the trust fund payments were also the *earnings* of the worker collectible as debts. No withdrawal was made from the broad reading of *Carter.*

Much has been said also about *Potomac Electric Power Co. v. Director, OWCP, supra,* where the claimant unsuccessfully attempted to avoid the schedules of compensation laid down by the Act (Pet. Bf. pp. 10a-11a). The case again demonstrates, as in *Embassy,* that this Court will apply specific terms set out in a statute. If Congress enacted the schedules in plain words, they were to be followed regardless of any hardship caused by subsequent inflation. The considerate change by the D.C. Circuit was reversed.

Since we argue here for the correctness of the ruling below and the comprehensiveness of the statutory definition of "wages" in the Act, *PEPCO* is a decision which directly supports the position taken by the Court of Appeals and completes our conclusion that all federal court decisions agree with the ruling below.

## IV.

## THE REVERSAL OF POSITION BY THE DEPARTMENT OF LABOR IS NOT A SUFFICIENT GROUND FOR CERTIORARI

As of this point it seems reasonably clear that the decision below was fully in accord with all traditional measures of correctness. The arguments of petitioners show no validity in the light of the facts of the case. Sum-

mary affirmance would appear to be called for. There is, however, one serious obstacle to the further enforcement of the Court of Appeals holding. This is the reversal of agency position on this issue.

Before the Benefits Review Board and the Court of Appeals in this case the respondent Director of the Office of Workers' Compensation Programs argued for the inclusion of Morrison-Knudsen's three Taft-Hartley trust fund payments in the compensation base of Hilyer on the ground that these were a part of his "wages" as defined by the Act, and the same stance has been taken before the Ninth Circuit where the Director said,

> "Apparently, counsel for the Director who presented oral argument did state, without elaboration, that the pension plan payments should be included when computing decedent's average wage."
>
> *Duncanson-Harrelson Co. v. Director, O.W.C.P.* No. 79-7093, Supp. Bf. for the Director, p.2

However, on this application the Director has not merely reversed his position — as he did in the cited memorandum in the Ninth Circuit — but has additionally joined with the other petitioners in the prayer for review by certiorari, saying now that these "fringe benefits" should *not* be included in Hilyer's compensation base.

It has to be conceded as a hornbook proposition that the general rule is that a regulatory interpretation of a statute by the responsible agency has judicial significance in a case of true ambiguity of statutory phrase and may be binding where an omission occurs, *Ford Motor Co. v. Milhollin,* 444 U.S. 555 (1980). While reversal of position by an agency is not an unknown occurrence, the statute remains as the governing factor, and an agency reading by practice or regulation will be followed only when it reasonably accords with the Con-

gressional purpose. Although this respondent considers the language of the statute and the legislative intent to be sufficiently clear to make the Director's present stand unreasonable, it cannot be denied that the views of the Department of Labor carry great weight.

Nevertheless, this respondent argues that the policy reversal involved is not an adequate basis for granting certiorari. We have found no prior instance in which any federal agency reversed itself following a Court of Appeals decision which it had sponsored, in order to join in a contrary application for certiorari. There have of course been confessions of error by the Solicitor General, but those have been for the avowed purpose of avoiding certiorari, not in order to apply for its granting. Here the Director, who as a judge on the Board had earlier written the adverse decision in *Hilyer,* has now joined with the original petitioners in order to request the granting of the writ to reverse the decision favorable to Mrs. Hilyer.

Nor, in this respondent's opinion, is the change one resulting from Labor Department concerns about the administrative difficulties which might arise in evaluating "fringe" benefits.

The Solicitor General's brief concedes that such benefits as these three were not merely the outcome of a statutory negotiation leading to the collective bargaining agreement (Dir. Bf. p. 2) under which Hilyer was paid, but are given in "money terms". If we are correct in our showing that the challenged decision was in accord with the statutory definition of "wages", agreed with the observable intent of Congress, and followed all prior federal cases, is it now to be changed to adopt the current reading of the statute by the Department of Labor?

It is said that this is merely a return to a long established point of view. Yet a reading of the full 1968 Labor Department memorandum referred to by the Solicitor

General (Bf. p. 4, complete text in *Amicus* Bf. of A.I.A., pp. 1a-4a) does not seem to describe any firm commitment to exclude negotiated benefits from compensation wages; it merely seems to say that an insufficient basis existed for change. The memorandum takes note of *Carter* as being somewhat to the contrary, adds that this position was not changed by the *Embassy* decision, and concludes that for the lack of more specific judicial authority, the existing exclusion practice should be allowed to continue.

On this point the question of dating is important. Many arguments are made by the three petitioners on unassailable personal assertions that the decision below upsets a long tradition of the insurers, employers, Board and courts. Yet neither *Collins v. Todd Shipyards Corp.*, 5 BRBS 334 (1977), nor *Hilyer* was decided by the Board *until 1977*, long after Congress had acted in the statutes referred to above. As the Director puts it, the ruling below is "the first judicial decision to *reject* the view that LHWCA wages do not include fringe benefits. . ." (Dir. Bf. p. 5; Emphasis added). To read that phraseology, one is left with the implication that numerous prior decisions had been handed down which excluded such benefits as these from the compensation wage base. Yet as we have indicated in Part III above, there are no such cases, all court decisions being supportive of the Court of Appeals ruling in this case —perhaps with the one exception of the Arizona state decision referred to by the Court of Appeals (Pet. App. p. 10a, ftn. 7) — and the first judicial analysis was in 1981! What then becomes of these multiple arguments that a rejection of benefit inclusion in the compensation basis has been such a long-standing position by practically everyone?

Finally, the Director argues that administrative chaos and confusion in evaluation of these programs by an inadequacy of personnel will be the inevitable result of the challenged ruling. The argument seems wrong. Evalua-

tion is not that difficult. First, this is a *death* claim under § 910 of the Act, which eliminates any life table or vesting calculations since Hilyer could have no further call on these funds and is deemed to continue in the same position indefinitely. Second, the only benefits involved under these facts are the outcome of statutory bargaining between this employer and his employees' union and are tax-deductible as part of his payroll. Nor is there any great need here for complex actuarial calculations. The payments to the funds were each in a stated dollar amount, as the Court of Appeals noted in holding that *Carter* suggested adopting that sum to measure Hilyer's equity and earnings.

*In toto,* the change of position by the agency does not appear to be based on any exercise of a reasonable effort to interpret an ambiguous statute. The position taken does not accord with other existing statutes or past cases. It fails to distinguish between items of minor advantage, including all the various forms of petty privilege, and the three negotiated payments which were made by this employer in order to secure Hilyer's services. Finally, it does not represent a return to any firm agency position previously taken by the Board and contradicts the liberal construction rule of the statute, *Friend v. Britton,* 220 F.2d 820 (D.C. Cir. 1955) (Pet. App. p. 13a). The petition of the Director should be ignored.

## CONCLUSION

The writ should be denied. The insurer/employer petitioners and *amici* seek to return to 1927 labor practices. In doing so they have delayed proper payment interminably. Eight years of constant litigation have gone by since Hilyer died. On that basis, complete compensation is hardly the "expeditious" remedy which was said to be a prime purpose of the statute in *Cardillo v. Liberty Mutual Co.,* 330 U.S. 469 (1947).

The manner of wage determination has long since changed. The National Labor Relations Board has been charged with determining which benefits will be subject to labor bargaining (29 U.S.C. § 151 *et seq.*), and have selected several — including these three — which require employer payments to be made into union-held Taft-Hartley trust funds. Such employee benefits are today among the usual "conditions of employment" clause of the LMRA. When such sums are paid by an employer on the measured basis of each employee's working hours, they create an equity base in the funds, and are as necessarily a part of his wages as if they had been paid to him in hand to be turned over to the union. Moreover, the ultimate payments from the fund to the employee are fully taxable in his hands as deferred compensation.

The change in the Labor Department's position does not give such credibility to petitioners' argument as to mandate a review by this Court.

Respectfully submitted,

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